

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et. al.)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-TCK-SAJ
)	
TYSON FOODS, INC., et. al.)	
)	
Defendants.)	
)	

**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITON TO
MR. RANDY ALLEN'S "MOTION TO QUASH SUPOENAS
FOR DEPOSITION AND DOCUMENT PRODUCTION"**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), by and through counsel, and responds to Mr. Randy Allen's "Motion to Quash Subpoenas for Deposition and Document Production" [DKT # 934] ("Motion") and "Petersons Farms, Inc.'s Joinder in Randy Allen's Motion to Quash Subpoenas for Deposition and Document Production" [DKT #936], as follows:

1. Mr. Randy Allen ("Mr. Allen") has publicly held himself out as an individual with knowledge of, *inter alia*, (1) the Oklahoma poultry industry's purported compliance with the law with regard to the land application of poultry waste, (2) the Oklahoma poultry industry's conduct with respect to the handling of "excess" poultry waste, and (3) the Oklahoma poultry industry's purported efforts "to help our environment." Nowhere in his public statements does Mr. Allen limit his claimed knowledge to only the Eucha Watershed where his poultry growing operations reportedly exist. In fact, Mr. Allen has made reference to (well-founded) claims by the Attorney

General which, of course, pertain to conduct by the poultry industry within the Illinois River Watershed. The subject areas set out above are thus plainly relevant to the claims asserted in the State's lawsuit. The subpoenas served by the State on Mr. Allen seek discovery of information related to these subject areas. Accordingly, contrary to the arguments raised in Mr. Allen's Motion, the subpoenas are indeed reasonably calculated to lead to the discovery of admissible evidence, and Mr. Allen's Motion should be denied.

2. Mr. Allen is a poultry grower. Given that, as noted above, he has publicly held himself out as an individual with knowledge of poultry industry operations and waste disposal practices in Oklahoma generally (including, of course, the Illinois River Watershed), the State is entitled to test the basis, reliability and credibility of this claimed knowledge by inquiring into the specifics of his own poultry operations and poultry waste disposal practices. Such inquiry is therefore plainly relevant and can hardly be characterized as either overbroad or unduly burdensome. Accordingly, contrary to arguments raised in Mr. Allen's Motion, the breadth of the discovery sought by the State in its subpoenas is entirely appropriate. Mr. Allen's Motion should therefore be denied.

I. Legal Standard

The scope of discovery permitted under a Fed. R. Civ. P. 45 subpoena is the same as the scope of discovery permitted under Fed. R. Civ. P. 26 and 34. *See, e.g., In Re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 669 F.2d 620, 623 (10th Cir. 1982); *United States ex rel. Schwartz v. TRW, Inc.*, 211 F.R.D. 388, 392 (C.D. Cal. 2002) ("The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34") (*quoting* Advisory Committee

Notes to 1991 Amendment to Rule 45); *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter of Haverstraw, Inc.*, 211 F.R.D. 658, 663 (D. Kan. 2003).

The parameters of permissible discovery under Fed. R. Civ. P. 26 are well-defined. "Parties may obtain discovery regarding any manner, not privileged, which is relevant to the claim of defense of any party Relevant information need not be admissible at trial if the discovery appears to be reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).¹

"Demonstrating relevance is the burden of the party seeking discovery. . . . Relevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party. A request for discovery should be allowed 'unless it is clear that the information sought can have no possible bearing' on the claim or defense of a party." *Goodyear Tire & Rubber Co.*, 211 F.R.D. at 663 (citations omitted). "When the discovery sought appears relevant on its face, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under Rule 26(b)(1), or (2) is of such marginal relevance that the potential harm the discovery may cause would outweigh the presumption in favor of broad disclosure." *Goodyear Tire & Rubber Co.*, 211 F.R.D. at 663.

Finally, "[w]hether a subpoena imposes an undue burden upon a witness is a case specific inquiry that turns on 'such factors as relevance, the need of the party for the documents, the

¹ As officers of the Court, counsel for the State are obligated to point out that Mr. Allen erroneously cites to the prior version of Fed. R. Civ. P. 26(b)(1) in his motion as the appropriate legal standard. While the prior version of Fed. R. Civ. P. 26(b)(1) is arguably more favorable to the State, as will be demonstrated below, the State can easily satisfy the requirements of the new version of Fed. R. Civ. P. 26(b)(1).

breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.'" *Goodyear Tire & Rubber Co.*, 211 F.R.D. at 662 (citation omitted).

II. Background

Mr. Allen has appeared in print advertising running in Oklahoma (including in the Illinois River Watershed) stating the following:

Gene & Randy Allen. Oklahoma farmers.

There are two things farmers are: hardworking and honest. In no particular order. That's why it's so surprising that the Attorney General is claiming poultry farmers are breaking the law when it comes to applying poultry litter as fertilizer to their land. Truth is, they're only applying what the law allows. If there's any left, they sell it to other farmers who use it to help their crops grow. It's just one of many things the industry is doing to help our environment. The farmers. The companies. Working together.

Exhibit 1 (from Poultry Community Council website found at <http://www.OklahomaPoultry.org>). In addition, Mr. Allen has also appeared in television advertisements discussing the Attorney General and the State's lawsuit. *See* <http://www.npr.org/templates/story/story.php?storyid=4537585>. The stated purpose of this advertising "is to educate the public about the poultry industry." Exhibit 2 ("Poultry Lawsuit Ads Pulled," *Tulsa World*, Sept. 26, 2006); Exhibit 3 ("AG critical of poultry promos," *Tulsa World*, Sept. 19, 2006)("The council's purpose is to 'educate the general public about the poultry industry, how we run our business, what we do and don't do, (and) what we are doing to address concerns about our impact on the environment over there.'").

Nothing in this advertising limits its content to poultry industry activities or conduct solely outside the Illinois River Watershed. In fact, the advertising is implicitly (at the very

least) referring to poultry industry activities or conduct within the Illinois River Watershed. *See*, Exhibit 1 ("the Attorney General is claiming poultry farmers are breaking the law").

Simply put, Mr. Allen has publicly held himself out as an individual with knowledge of, *inter alia*, (1) the Oklahoma poultry industry's -- including that part of the Oklahoma poultry industry located in the Illinois River Watershed -- purported compliance with the law with regard to the land application of poultry waste, (2) the Oklahoma poultry industry's -- including that part of the Oklahoma poultry industry located in the Illinois River Watershed -- conduct with respect to the handling of "excess" poultry waste, and (3) the poultry industry's purported efforts "to help our environment" -- including the environment located in the Illinois River Watershed.

A central claim of the State's First Amended Complaint is that the improper handling and disposal of poultry waste for which the poultry industry is legally responsible has caused an environmental injury to those portions of the Illinois River Watershed located in Oklahoma. *See, e.g.*, First Amended Complaint, ¶ 1.

In light of the foregoing, the State, on September 27, 2006, issued subpoenas to Mr. Allen for a deposition and for documents. The document request was approximately 3 pages and contained 29 carefully described categories of information. The categories can be broken down into three groupings. The first grouping seeks documents pertaining to Mr. Allen's own poultry growing operations. *See* Subpoena Request Nos. 1, 2, 3, 4, 5, 6a, 7, 8, 9a, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 25 & 26. The second grouping seeks documents pertaining to Mr. Allen's claimed knowledge as to the conduct and practices of the Oklahoma poultry industry -- including that part of the Oklahoma poultry industry located in the Illinois River Watershed. *See* Subpoena Request Nos. 6b, 9b, 21, 22, 23 & 24. The third grouping seeks documents pertaining to the implementation of the *City of Tulsa* settlement. *See* Subpoena Request Nos. 27, 28 & 29.

On October 6, 2006, Mr. Allen moved to quash the subpoenas.

III. Argument

A. The subpoenas are reasonably calculated to lead to the discovery of admissible evidence

The entirety of Mr. Allen's argument that the subpoenas are not reasonably calculated to lead to the discovery of admissible evidence is that Mr. Allen "is a farmer with poultry growing operations in the Eucha Watershed -- not the Illinois River Watershed" and, therefore, under this Court's October 4, 2006 Opinion and Order [DKT #932] "discovery from Randy Allen is not obviously relevant." Mr. Allen's Motion, p. 4. This argument is easily addressed.

First, Mr. Allen has publicly held himself out as an individual with knowledge of, *inter alia*, (1) the Oklahoma poultry industry's purported compliance with the law with regard to the land application of poultry waste, (2) the Oklahoma poultry industry's conduct with respect to the handling of "excess" poultry waste, and (3) the Oklahoma poultry industry's purported efforts "to help our environment." *See* Exhibit 1. Further, the stated purpose of Mr. Allen's communications on these matters is "to educate the public about the poultry industry." *See* Exhibits 2 & 3. It is indisputable that "educate" means "to provide with information." *See* Merriam-Webster Online Dictionary at <http://www.m-w.com/dictionary/educate>. Nowhere does Mr. Allen disclaim that his claimed knowledge on these topics is limited to the Eucha Watershed where his poultry operations are located. Indeed, the apparent precipitating event for him going public on these topics is the State's Illinois River Watershed lawsuit against the poultry industry brought *ex rel.* the Oklahoma Attorney General. *See* Exhibit 1. The State's claims in its lawsuit and Mr. Allen's claimed knowledge plainly dovetail, and relevancy is amply established. *See Goodyear Tire & Rubber Co.*, 211 F.R.D. at 663 ("Relevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information

sought may be relevant to the claim or defense of any party. A request for discovery should be allowed 'unless it is clear that the information sought can have no possible bearing' on the claim or defense of a party").

Relatedly, the State is entitled to inquire as to the basis, reliability and credibility of Mr. Allen's claimed knowledge of poultry industry operations and waste disposal practices in Oklahoma generally (including, of course, the Illinois River Watershed). Presumably, much of this claimed knowledge is derived from his own experiences as a poultry grower. Inquiry into the specifics of his own poultry operations and poultry waste disposal practices is thus clearly relevant. *See Goodyear Tire & Rubber Co.*, 211 F.R.D. at 663.

Finally, the State is entitled to inquire into knowledge Mr. Allen may have as to the implementation of the *City of Tulsa* settlement. Information on this issue plainly informs the inquiry as to environmental impact of the Poultry Integrator Defendants' poultry waste disposal practices (*e.g.*, the Poultry Integrator Defendants' awareness of the propensity of poultry waste to run-off and leach into the environment and cause environmental pollution and contamination; the Poultry Integrator Defendants' awareness of the need for appropriate poultry waste handling and disposal practices, etc. . .). It is therefore relevant. *See Goodyear Tire & Rubber Co.*, 211 F.R.D. at 663.

Simply put, contrary to Mr. Allen's suggestion, the relevancy of the areas of inquiry set forth in the subpoena are clear on their face, and the burden therefore falls on the movant to establish why discovery should not be had. *Goodyear Tire & Rubber Co.*, 211 F.R.D. at 663. Mr. Allen's reliance on this Court's October 4, 2006 Opinion and Order is unavailing. In that Opinion and Order, the Court explained:

The Court is not holding that no documents from the City of Tulsa action are relevant to this action. The Court is finding that Plaintiffs have not sufficiently

articulated the relevance of the documents sought. . . . Plaintiffs may tailor more specific discovery requests detailing the documents or topics requested.

October 4, 2006 Opinion and Order, p. 6. As explained above, the State is not seeking documents that merely pertain to a different watershed; it is seeking information that bears directly on the claims in this lawsuit. The State has more than adequately described the relevancy of this information. Further, the discovery requests are highly specific and detailed. Mr. Allen's relevancy argument thus fails.

B. The subpoenas are carefully targeted at eliciting relevant information

Mr. Allen also argues in a conclusory manner that the subpoenas are overbroad because they seek a several-page-long list of documents, the list seeks information beyond that which Mr. Allen is required by the State to maintain as a registered poultry grower, and that the information sought is unlimited in time. As to the first point, a review of the document requests reveals that they are highly specific and detailed. Indeed, the State went to great lengths to draft these requests to describe and identify with particularity the sought-after documents specifically to avoid an argument that they were "facially overbroad." As to the second point, the information sought by the State of course goes beyond merely those materials Mr. Allen is required by the State to maintain as a registered poultry grower because the State is seeking to probe the breadth and source of Mr. Allen's claimed knowledge about the topics identified above. And as to the third point, the relevant time frame is that which forms the source of Mr. Allen's claimed knowledge about the topics identified above. Simply put, the requirement that a discovery request not be overbroad "is but a restatement of the proposition that the relevance of and need for [the discovery] sought will bear on the reasonableness of the subpoena." *United States v. IBM Corp.*, 83 F.R.D. 97, 106 (S.D.N.Y. 1979). A subpoena runs the risk of being found overly broad and unreasonable when it "sweepingly pursues material with little apparent or likely

relevance to the subject matter" of the lawsuit. *IBM Corp.*, 83 F.R.D. at 106-107. For all the reasons set forth above, such is clearly not the case here. The State's subpoenas to Mr. Allen seek information that is carefully delineated, and the State has amply demonstrated relevancy.

C. The State's subpoenas do not pose an "excessive burden to Mr. Allen"

As noted above, the State has gone to great lengths to make its discovery requests narrowly tailored so as to get the information it is entitled to with a minimum of burden on Mr. Allen. The simple fact of the matter is that "[a] subpoenaed party will always be forced to endure some inconveniences and burdens when complying with a subpoena, but these inconveniences and burdens are necessary to the furtherance of a Government agency's legitimate inquiry and is in the public's best interest." *Inspector General, U.S. Dept. of Housing and Urban Development v. St. Nicholas Apartments*, 947 F.Supp. 386, 392 (C.D. Ill. 1996). It would be manifestly unfair for Mr. Allen to be able to hold himself out to the world as having information that goes to the core of the claims the State is making in its lawsuit, and then claim that the State is not entitled to discovery as to that information. The State is more than willing to work with Mr. Allen in the scheduling of his production of documents and deposition so as to cause a minimum of disruption to his business. However, the State is entitled to timely production of Mr. Allen's documents and timely scheduling of Mr. Allen's deposition.

D. Mr. Allen's request for additional time to make objections is improper

While it is the State's position that it is clear from the face of the subpoenas that the information sought by the State from Mr. Allen is (1) clearly relevant, and (2) clearly not overly broad, and that therefore Mr. Allen should have raised any and all objections at the time he filed his motion, *see United States ex rel. Schwartz v. TRW, Inc.*, 211 F.R.D. 388, 392 (C.D. Cal.

2002), the State nonetheless is willing to accede to a limited timeframe within which Mr. Allen can raise any appropriate privilege claims that are responsive to the State's document requests.

IV. Conclusion

WHEREFORE, premises considered, the State respectfully requests that this Court deny Mr. Allen's "Motion to Quash Subpoenas for Deposition and Document Production" [DKT #934] and Peterson Farms, Inc.'s Joinder in Randy Allen's Motion to Quash Subpoenas for Deposition and Document Production [DKT #936].

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I hereby certify that on this 23rd day of October, 2006, I electronically transmitted the attached document to the following:

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